CF0000064378

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR[M.P.]

Criminal Appeal No. 2578 /2000

Appellants:- (in Jail) :

1- Vijay S/o Shri Mahadeo Aged about 22 years, R/o Tarkinal – Turenar P.S. Nagarnar District Bastar (M.P.)

2. Vainu Kumar S/o Shri Shivram aged about 25 years, R/o Tarkinal – Turenar P.S. Nagarnar District Bastar (M.P.)

Kusdeo S/o Shri Sadhuram Aged about 22 years R/o Tarkinal – Turenar P.S. Nagarnar District Bastar (M.P.)

(10722)

Certified Copy of W. G. Criminal Appeal/Revision
Date 13/10/2000
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O/o. Advocate General
M. P. JABALPUR
Filed on 13/10/2k
by Shri A. K. Choudhary
Advocate
Encl. A.P.

VERSUS

Respondent:- : State of M.P. Through P.S. Nagarnar District Bastar (M.P.)

Conviction	Sentence
U/S 302 of the Indian Penal Code 1860.	R. I. for life Imprisonment And fine RS. 500/- in default R. I. for one year
U/S 307 of the Indian Penal Code 1860.	R. I. for 7 years Imprisonment And fine RS. 500/- in default R. I. for 1 year

(Criminal Appeal U/S 374 (2) of the Code of Criminal Procedure 1973)

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HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 2578 of 2000

Appellants — Vijay and two others

Versus

Respondent — State of M.P.(now State of Chhattisgarh)

DIVISION BENCH : Hon'ble Mr. Justice **Dhirendra Mishra**, and Hon'ble Mr. Justice **Satish K. Agnihotri**, JJ

Shri Y. C. Sharma, Advocate for the appellants.

Shri Sudhir Bajpayee, Panel lawyer for the State.

ORAL JUDGMENT

(11TH July, 2006)

The following order of the Court is delivered by **Dhirendra Mishra, J.**

1. The appellants have preferred this appeal under Section 374(2) of the Code of Criminal Procedure as they have been convicted by the learned Second Additional Sessions Judge, Baster, Jagdalpur vide judgment dated 30.8.2000 passed in Sessions Trial No. 409/99, under Section 302 and Section 307 of the Indian Penal Code for causing death of Madhuram and for attempting to murder his brother Dharam Singh and sentenced each of the appellants to undergo imprisonment for life under Section 302 and to pay fine of Rs. 500/-, in default one year's additional rigorous imprisonment and under Section 307 rigorous imprisonment for 7 years and to pay fine of Rs. 500/-, in default rigorous imprisonment for one year. Both the sentences are to run concurrently.

2. The case of the prosecution as reveals from the dehati nalisi (Ex.P/3) is that on 31.12.1998 when the deceased was going

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on duty from his home and when he reached near village some fight was going on in the cock-market. He also went there and saw that his elder brother Dharam Singh was laying injured as he was assaulted by some unknown person. Then he reached there, the same person who was putting on coat assaulted him also by knife on his stomach and thereby caused grievous injury. His brother has sustained two grievous injuries over his elbow. After the incident both the brothers were taken to the hospital at Jagdalpur by the family members and were admitted thereat. The offence under section 307 was registered against unknown persons.

3. The injured Dharma Singh was sent to the hospital for examination vide Ex.P/4 where Dr. Govind Singh (P.W.13) examined him and gave his report (Ex P/17). The complainant Madhuram died on the following day on 1.1.1999 at about 7.20 a.m. On his death the intimation (Ex.P/19) was given by the police constable which was recorded into the merg-intimation (Ex. C/2). After conducting the inquest (Ex P/5) over the person of the deceased Madhuram his body was sent for autopsy to Maharani Hospital where vide Ex.P/6 Dr. Govind Singh conducted the postmortem and submitted his report Ex. P/15. Articles of the deceased in a packet were taken in to the possession vide Ex.P/7. After the death the F.I.R. was registered vide Ex.P/11 at police Station Nagar Nar. Site map was prepared by the Investigating Officer vide Ex.P/12. On the memorandum (Ex.P/1) the statement of the accused Venu Kumar was recorded on 15.3.1999. On the memorandum statement of Vijay Mahra (Ex.P/13) the weapon

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of offence i.e. Kati (knife) was taken into possession vide Ex.P/14 on 19.3.1999. The seized knife was sent for examination to Dr. Govind Singh, who submitted his report Ex.P/18 and did not give any opinion whether the injury over the person could be caused by weapon in question. However, he suggested that the knife be sent for further chemical examination to the laboratory.

4. The clothing of the deceased and the knife seized from the accused Vijay were sent for chemical examination to forensic science laboratory, Raipur vide Ex.P/21, The report of the F.S.L. is Ex.P/22 in which blood has been found on the clothing of the deceased and the knife was not found blood stained. After completing the investigation the charge-sheet under Section 302 and 307 read with Section 34 of the I.P.C. was filed in the Court of Judicial Magistrate, Jagdalpur against Vijay , Venu Kumar and Kusdeo, and the same was committed by the learned Chief Judicial Magistrate to the Court of Additional Sessions Judge, who in turn, after receiving the case on transfer, framed charges under Section 302 and 307 of the I.P.C. The charges were separately framed against the appellants, who abjured their guilt.

5. The prosecution in order to prove the charges examined 16 witnesses in all. Thereafter the statements of accused under section 313 of the Cr.P.C. were recorded, who denying any of the circumstances against them of the prosecution case, pleaded innocence and false implication. The accused/appellants have examined one witness in defence.

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6. After hearing learned Public Prosecutor and learned counsel for the appellants the appellants have been convicted and sentences by the trial Court, as mentioned above.

7. The homicidal death of the deceased Madhuram is not in dispute. Even on perusal of the statement of P.W. 13, who had conducted the autopsy over the dead body of Madhuram and has submitted his report Ex.P/15 in which he has found injuries as described below.:-

> "Incised injury measurement 1½ x ½ c.m. in small intestine. Injury is antemortem in nature caused by hard and sharp object."

and opined the cause of death as shock owing to excessive internal hemorrhage and death to be homicidal in nature was established. The trial Court has based conviction of the appellants upon the statements of P.W.2 Dharam Singh, the injured eye witness, P.W.1 Lakhpati and P.W.3 Mannuram, father of the deceased, who have clamed themselves to be eye witnesses.

8. Learned counsel for the appellants submits that so far as the statement of P.W.1 is concerned he was not able to identify the accused persons by name and he identified one of the appellants namely Venudhar only during his examination in the Court. He further submits that there are material omissions in the diary statements and looking to the discrepancy of the evidence in the examination in chief and cross-examination, the evidence could not be relied on. So far as the statement of Dharm Singh is concerned it is averred that the diary statement of this witness was recorded after a lapse of six months and there is no explanation regarding

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delay and even the police officer who recorded the diary statement has not stated about inordinate delay. Apart from this it is argued that the dying declaration of this witness was recorded by the Executive Magistrate vide Ex.C/1 and if the statement that he has given in the Court is compared to the statement he has given before the Executive Magistrate are taken into consideration, it would be evident that there is material discrepancy in both the statements and this witness is not a witness of truth. Even otherwise, this witness has made a material improvement from his diary statement as is evident in the cross examination. Similarly Mannuram (PW 3), father of the deceased has given wavering account of the incident in the cross-examination and the examination in chief and he was declared hostile and permitted to cross examine and in the cross-examination he has made allegation against the appellants but subsequently on being cross-examined by the defence he has again made altogether contradictory statement and in the light of the above discrepancies of all the three alleged eye witnesses, the evidence does not inspire confidence and the Court below was not justified in basing the conviction on the testimony of these eyewitnesses.

9. On the other hand learned counsel for the State supports the conviction.

10. We have perused the record of the trial Court and the impugned judgment. The conviction of the appellants is based on the statements of P.W.1 Lakhpati, P.W.2 Dharam Singh and P.W.3 Mannuram, who have been cited as eyewitnesses to the incident. The other evidence available on record is

memorandum of the accused Vijay and in pursuance of the said memorandum the recovery of the blood stained knife. However, from the report of the F.S.L. we find that the weapon of offence i.e. knife seized, blood stains were not found on the said weapon of offence and therefore the memorandum and recovery pursuant to the memorandum is of no help to the prosecution.

11. P.W.2 Dharam Singh is an injured eyewitness of the incident. His dying declaration was also recorded by the Executive Magistrate on the following day and his diary statement Ex.D/2 was recorded on 9.6.1999 and the officer recording the diary statement has not been examined. This witness has stated in his deposition that the accused persons had in fact came to the market with a plan to kill him. They assaulted him by club in the cock-market. He received one injury on leg and two injuries on back. Kusdeo assaulted him by club, after he fell on ground, Kusdeo and Vijay caught him and Venudhar pounced over him and in that position two blows on his chest by Kati(knife) were given. When he tried to inflict third blow, he received injury near nose. He stated, in the meanwhile Madhuram came and on arrival of Madhuram, Kusdeo and Vanu caught him and Vijay assaulted Madhuram by knife over his stomach. He has further stated, behind him his father Mannuram also came and he saw accused assaulting and from there he and his brother were taken to Maharani Hospital by 407 vehicle. He further stated that he was admitted in the hospital from 31.12.1998 to 25.1.1999 and his brother succumb to the injuries in the hospital at about 4-5 am on 1st

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January, 1999. If we go through the cross-examination of this witness we find that some insignificant omissions and contradictions so far as assault by the appellants to him are concerned. Looking to the fact that the statement of this witness is duly corroborated by the statement of P.W.13 Dr. Govind Singh, who has examined him after the incident on 31.12.1998 itself and who has found the injuries described below, in his report and Ex. P/18, assault by the appellants to injured Dharam Singh is established.

(1) Incised injury right side of the chest 5 c.m. beside the right nipple medially measurement 2 c.m. x ½ c.m. cavity deep bleeding+

(2) Incised injury on the right side of the chest 2 c.m. beside the nipple. Laterally measurement 1 x ½ c.m. x ¼ c.m.

(3) Incised injury on right nostril. Laterally measurement 1 x ½ x ¼ c.m.

12. However, in the statement of this witness that after arrival of Madhuram, the accused Venu and Kusdeo caught and Vijay dealt a blow on his stomach is concerned, in his diary statement we find that this fact of 'Venu and Kusdeo caught him' is missing. In the end of paragraph 6 of his deposition this witness has stated that at that time there was a crowd when Madhuram came to save him and it is correct to say that someone from the crowd assaulted my brother with Kati (knife). If we consider this statement of the witness in totality, we find that this witness is not in fact an eyewitness of the assault by Vijay to the deceased Madhuram and to that extent the statement of this witness does not inspire confidence. It is

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not safe to hold the appellant guilty for causing death of his brother.

13. Apart from this we also find that P.W.1 Lakhpati has stated in his examination in chief that three boys assaulted Madhuram, he will identify if brought before him and he pointed towards the accused Venu as one of those persons, who had assaulted Madhuram and this witness also given contradictory account of the incident. He has also been cross-examined in detailed and we find that number of omissions and contradictions are there in his deposition. The statement of P.W.3 is full of discrepancies. In the examination in chief he has totally resiled from his diary statement and he has been declared hostile. In the cross-examination this witness has stated that Vijay dealt knife blow on Madhuram. However, in the cross-examination this witness has further stated that it is correct to say that there was a big crowd where the cock-fight was going on and he was in the pan shop and he has not seen the quarrel.

14. On the basis of the aforementioned evidence we are of the considered opinion that the finding of the Court below holding the appellants guilty of causing death of deceased Madhuram and convicting and sentencing him under Section 302 of the I.P.C. cannot be sustained. Accordingly, the judgment is set-aside to that extent. However, so far as the finding of the Court below, holding the appellants guilty under section 307 of the I.P.C. for assaulting Dharam Singh with intention to cause his death is established and the judgment of conviction

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and sentence passed by the trial Court to that extent is maintained.

15. In the result, the appeal is partly allowed. The conviction and sentence of the appellants under Section 302 of the I.P.C. is set-aside and the appellants are acquitted of the above charge. However, the conviction and sentence under Section 307 of the I.P.C. is maintained.

16. The appellant No. 1 Vijay and appellant No.3 are on bail. Their bail bonds are cancelled. They be taken into custody for undergoing the remaining part of the sentence awarded for commission of the offence under Section 307 of the I.P.C.

Sd/-
DHIRENDRA MISHRA
Judge

Sd/-
Satish K. Agnihotri
Judge

Thakur